

**DISTRICT OF COLUMBIA
DOH OFFICE OF ADJUDICATION AND HEARINGS**

DISTRICT OF COLUMBIA
DEPARTMENT OF MENTAL HEALTH

Petitioner,

v.

HFM ENTERPRISES, INC.
Respondent

Case No.: I-02-90020

FINAL ORDER

I. Introduction

On October 25, 2002, the Government served a Notice of Infraction upon Respondent HFM Enterprises, Inc., alleging that it violated 22 DCMR 3819.4, which requires a mental health community residence facility to maintain accurate personnel records. The Notice of Infraction alleged that the violation occurred on October 3, 2002 at 2020 Fendall Street, S.E., (the “Fendall Street Facility”) and sought a fine of \$100. Respondent filed a timely answer with a plea of Admit with Explanation and the Government has filed a reply.

II. Summary of the Evidence

Respondent states that the Fendall Street Facility did not have criminal record information for two employees who were present there on October 3. Respondent asserts that one staff member had not requested her criminal record until September 25, because she was “awaiting additional legal documents from her lawyer” that were needed to obtain her record. Respondent further asserts that, on or about October 4, 2002, it received a copy of documentation from the Maryland Department of Public and Correctional Services showing that the employee

had no criminal record. Respondent also asserts that the other staff member had been hired on October 2, 2002 to work at another facility, but was being trained at the Fendall Street facility on October 3, the date of the inspector's visit there. According to Respondent, that worker's personnel file was maintained at the other facility, and included a copy of a police report stating that she had no criminal record.

The Government responds that the "Department of Mental Health, Division of Licensure, is denying the request by the respondent for a suspension or reduction of the fine" That response misperceives the applicable procedures when a Respondent pleads Admit with Explanation. Upon receipt of such a plea, an order is usually issued providing the Government an opportunity to reply to the Respondent's request for suspension or reduction of the fine. The presiding Administrative Law Judge, not the Government agency prosecuting the case, has the power to suspend or reduce a fine, D.C. Official Code §§ 2-1801.03(4), 2-1802.02(a)(2), but he or she generally will provide the Government an opportunity to present its views on that issue. A conclusory statement that the Government opposes suspension or reduction of the fine, however, is of limited use in addressing the specific arguments put forth by a Respondent. Instead,

the Government should consider: (1) addressing with particularity the facts of an explanation provided by a respondent in support of the requested relief; (2) stating clearly why those facts, if credited, should or should not be considered by this administrative court in determining whether to grant the requested relief; and (3) identifying any other mitigating or aggravating factors specific to the respondent that the Government believes this administrative court should consider in determining whether to grant the requested relief. *See generally Celotex Corp. v. Cartrett*, 477 U.S. 317, 328 (1986) (noting mere conclusory statements are not a sufficient basis upon which to grant dispositive relief) (White, J., concurring); *Barkus v. Kaiser*, No. 00-7044, 2000 U.S. App. LEXIS 23638, at *5-6 (10th Cir., Sept. 19, 2000) (noting conclusory and unsworn allegations insufficient to rebut particularized assertions of fact).

DOH v. MT Mortgage Corp, OAH No. I-00-20272 at 3, n.4 (Final Order, August 7, 2002).

Absent a particularized rebuttal to Respondent's factual assertions, I will treat them as established, and will proceed to consider whether they support suspension or reduction of the fine.

III. Findings of Fact

Respondent's plea of Admit with Explanation establishes that it did not maintain accurate personnel records at the Fendall Street facility on October 3, 2002. Respondent had hired one worker even though she had not provided documentation concerning her lack of a criminal record. The worker had requested the documentation, but did not receive it or furnish it to Respondent until after the date of the infraction. One other worker was present at the Fendall Street facility for training on the day of the violation. That worker was assigned to another facility, and documentation of her lack of a criminal record was on file at that facility.

IV. Conclusions of Law

The regulation at issue provides:

Each [mental health community residence facility] shall maintain accurate personnel records, which shall include the following information:

* * *

(g) Documentation of conviction record.

22 DCMR 3819.4

Thus, the personnel records for each employee must contain information concerning the employee's criminal record. Respondent's plea of Admit with Explanation establishes that it violated § 3819.4 on October 3, 2002. A violation of § 3819.4 is a Class 3 infraction, punishable

by a fine of \$100 for a first offense. 16 DCMR 3241.3(bbb); 16 DCMR 3201. Respondent's explanation that one of the workers had applied for, but not yet received, information concerning her criminal record from the Maryland authorities is insufficient to warrant suspension or reduction of the fine. The worker's failure to provide the necessary documentation does not mean that Respondent was free to hire her while waiting for the records to arrive. *See DOH v. Angel Square*, OAH No. I-02-90004 at 4 (Final Order, February 12, 2003) ("[W]orkers who do not have the proper qualifications should not be hired."). Respondent's explanation concerning this worker evidences a lack of appreciation of the seriousness of hiring workers who do not furnish the documentation required by law, particularly when, as here, the documentation at issue provides important assurances for the safety of the residents at Respondent's facility. Accordingly, I will impose the full \$100 fine for the infraction.

Respondent has provided an explanation for its failure to have another worker's personnel records present at the Fendall Street facility. The Government, however, charged only one violation of § 3819.4, and the record concerning the first worker is sufficient both to establish liability for the violation and to demonstrate that the full fine should be imposed. Accordingly, there is no reason to address the record evidence concerning the second worker, as it can have no influence on the outcome of this case.¹

¹ The evidence concerning the second worker presents the question, not decided here, whether the operator of a community residence facility fails in its obligation to "maintain" a personnel record if the record is present at one of its residence facilities when a worker is temporarily assigned to another such facility. Section 3819.4 does not state where personnel records must be maintained. In construing similar regulations in other contexts, however, the appropriate inquiry has been whether the record in question is accessible within a reasonable time. *Compare DOH v. Bridges Academy*, OAH No. I-00-40007 at 3 (Final Order September 8, 2000) (child care center may maintain child's emergency medical form in an office across the street from the facility) *with DOH v. Symbral Foundation*, OAH No. I-00-40047 at 5 (Final Order May 12, 2000) (violation of record maintenance provision found when required record could not be produced after more than 2 ½ hours.)

V. Order

Based upon the foregoing findings of fact and conclusions of law, it is, this _____ day of _____, 2003:

ORDERED, that Respondent shall pay a total of **ONE HUNDRED DOLLARS (\$100)** in accordance with the attached instructions within 20 calendar days of the mailing date of this Order (15 days plus 5 days service time pursuant to D.C. Official Code §§ 2-1802.04 and 2-1802.05); and it is further

ORDERED, that if Respondent fails to pay the above amount in full within 20 calendar days of the date of mailing of this Order, interest shall accrue on the unpaid amount at the rate of 1½ % per month or portion thereof, starting from the date of this Order, pursuant to D.C. Official Code § 2-1802.03(i)(1); and it is further

ORDERED, that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondent's licenses or permits pursuant to D.C. Official Code § 2-1802.03(f), the placement of a lien on real and personal property owned by Respondent pursuant to D.C. Official Code § 2-1802.03(i) and the sealing of Respondent's business premises or work sites pursuant to D.C. Official Code § 2-1801.03(b)(7).

/s/ **02/24/03**

John P. Dean
Administrative Judge